IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

: O R D E R :

S.B. Criminal Revision Petition No.118/1993.
(Uma Nath Vs. State of Rajasthan)

DATE OF ORDER : February 15th, 2007

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. Vineet Jain for the petitioner.
Mr. J.P.S. Choudhary, P.P. for the State.

BY THE COURT :

This revision petition is directed against the judgment passed by the Special Judge, SC/ST Cases (Addl. Sessions Judge), Bikaner dated 20.04.1993 in Criminal Appeal No.31/1990 whereby the learned Special Judge confirmed the conviction recorded by the Chief Judl. Magistrate, Bikaner (hereinafter, 'the trial Court') vide judgment dated 19.05.1988 in Criminal Original Case No.91/1981 against the accused petitioner for offence under Section 409, I.P.C. The trial Court awarded the accused petitioner sentence to suffer rigorous imprisonment for a term of one year alongwith fine of Rs.1000/-, in default of payment of fine

to further undergo 3 months' simple imprisonment. The petitioner has impugned both the judgments in this petition.

Brief facts of the case are that the petitioner was substantively working on the post of Pump Driver in the Public Health Engineering Department in the office of the Assistant Engineer, Project Sub-Division III, P.H.E.D., Bikaner. At the relevant time, the petitioner was posted at Water Project, Bambalu. On 15.06.1981, as per the prosecution case, he was directed to recover water charges from the resident consumers of village Bambalu and he recovered Rs.2,792/- from the consumers of the village. But, the said amount was not deposited with the government treasury and the petitioner remained absent. Upon these facts, a complaint was filed before the Police Station Jamsar, being Ex.-P/4 dated 08.07.1981 in which the aforesaid facts were narrated. The said Ex.-P/4 was produced before the S.H.O. by the Junior Engineer of the concerned Sub Division, Shri Rajesh Gupta and upon that complaint case was registered by the Police Station, Jamsar vide F.I.R. Ex.-P/10 on 13.07.1981. Thereafter, investigation was initiated by the Police Station Jamsar.

As per further facts of the case, in connection with the incident of 15.06.1981, the F.I.R. was filed by the Assistant Engineer upon the instructions of the Executive Engineer of the Department on 08.07.1981, just after 23 days. During the investigation, as per facts of the case, the petitioner himself attended the office of the Assistant

Engineer on 05.08.1981 and deposited the amount of Rs.2,796/- which he had received from the consumers vide Ex.-P/6. The accused petitioner also furnished explanation Ex.-P/7 and produced all the documents including the bill-book, stamp pad, rubber seal and receipt of the treasury challan alongwith his explanation. It was explained by him that he had collected Rs.2,796/- from the consumers but due to rush while he was returning in bus the packet containing a sum of Rs.1050/- dropped from his bag or somebody stole the packet. He explained that due to loss of the money he was disturbed and he had to arrange for the money to make good the loss and, after having arranged the money, he deposited the recovered amount on 05.08.1981. The police, however, after investigation and taking into possession all the documents filed challan against the accused petitioner for committing offence under Section 409, I.P.C. and the explanation of the petitioner was not accepted by the Department.

At the trial, to prove its case the Prosecution led oral evidence of as many as 32 witnesses. Thereafter, statement of the petitioner accused under Section 313, Cr.P.C. was recorded by the trial Court in which it was specifically stated by the accused petitioner in answer to question No.9, as quoted hereunder :

> "मैंने सरकारी राशि का कोई गबन नहीं किया। पैसे मैंने बैंक में जरिए चालान जमा करवाए थे। सोहनलाल स्टोर कीपर से मेरी रंजिश है। उसी के कहने से यह सारी कार्यवाही मेरे खिलाफ़ की गई है। मुझे झुठा फंसाया गया है मैं निर्दोष हूँ।"

Before the trial Court specific plea was taken by the petitioner that no misappropriation was made by him and he has given proper explanation before the departmental authorities. It was pleaded by him that the amount in question was not utilized by him nor diverted to any use and only on account of the unforeseen incident of his having somehow lost the amount of Rs.1050/- out of the recovered amount, he was prevented from depositing the amount in time and he had to make efforts to arrange for an amount of Rs.1050/- to make good the loss; and, thereafter he deposited the said amount. It was further pleaded that the government money was only temporary in his possession from 15.06.1981 to 05.08.1981 and he furnished explanation for delay in depositing the amount, however, the authorities, discarding his explanation proceeded to file FIR against him without assigning any reason.

I have carefully perused the impugned judgments and considered the material on record.

It is true that money was legally entrusted to the petitioner and, according to the accused petitioner, due to unfortunate incident of his having lost a packet containing Rs.1050/- out of the amount of recovered money he was prevented from depositing the recovered amount in time and there was no intention to misappropriate the money, therefore, he has not committed any criminal breach of trust. Learned counsel for the petitioner invited attention of this Court towards definition of criminal breach of trust

as provided under Section 405 of the Indian Penal Code. Section 405, I.P.C. reads as under :

> "405.Criminal breach of trust.-Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Learned counsel for the petitioner vehemently argued that the basic ingredient to make out an offence under Section 409, I.P.C. against any person must be such committal of criminal breach of trust by such person by dishonestly misappropriating or converting to his own use or dishonestly disposing of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged. It is contended by learned counsel for the petitioner that while the investigation was still going on the petitioner himself attended the office of the Assistant Engineer on 05.08.1981 and presented the treasury challan of the deposit of the money in question with the treasury alongwith his explanation for not having been able to deposit the amount in time.

Learned counsel for the petitioner further contended that in this case the petitioner never disputed that he received the amount in question from the consumers and, rather, on the other hand, he submitted his explanation for

not having been able to deposit the amount with the government treasury in time. According to the learned counsel for the petitioner, even as per the prosecution, there is no suggestion of criminal breach of trust and the learned trial Court committed serious mistake of law in arriving at the finding of guilt against the petitioner. It is also submitted by the learned counsel that proper explanation was submitted by the petitioner but the trial Court has failed to consider the matter in correct and legal perspective. Learned counsel for the petitioner placed reliance upon the judgment of this Court in Chander Dutt Sharma Vs. State of Rajasthan, 1979 (Vol.IV) Cr.L.R. 142 in support of his arguments.

In the present case, the only question to be considered is whether the accused petitioner wanted to misappropriate the amount recovered from the consumers by him. As per the statement of P.W.-3 Rajesh Gupta, on 15.06.1981, he sent the petitioner to Bambalu to recover the amount from the consumers because on that day the store-munshi Sohanlal was on leave. Thus the petitioner was legally authorized to collect the money from the consumers by his superior. The receipts exhibited show that the receipts bear the signature of the petitioner and there is seal of the department. Further, on 15.06.1981, as alleged by the prosecution that the petitioner was absconding, there is neither any notice nor any memo issued to the petitioner nor any letter was sent to his residence by the department and straight away, just after 23 days, the FIR was

registered for offence under Section 409, I.P.C. against the petitioner. It is obvious on record that the prosecution did not allege at any stage of the trial that attendance of the petitioner was procured in the office in any manner than on his own volition nor the prosecution alleged that after receiving the money from the consumers the petitioner denied receipt of the money. Admittedly, the petitioner furnished explanation before the department for not having been able to deposit the money in time. The plausibility of the explanation was not put to anvil to prove dishonest intention on the part of the petitioner to misappropriate the government money. It is during the investigation that the petitioner deposited the amount in question while furnishing his explanation. The mere facts in this case that the petitioner at no point of time disputed having received the money from the consumers and further did not express any inability before the department in depositing the money are sufficient facts to establish absence of any palpable intention to commit criminal breach of trust on the part of the petitioner. Admittedly the FIR was registered on 13.07.1981 and from the statement of P.W.-3 Rajesh Gupta, Junior Engineer it is apparent that he was aware that on 15.06.1981 the petitioner was sent for collection of the revenue in village Bambalu. Had it been the case that the petitioner collected the revenue unauthorizedly the department must not have waited to lodge the FIR against unauthorized collection of revenue. Moreover, though delayed, the revenue received by the petitioner was duly deposited by him alongwith explanation

Ex.-P/7 whereby he sought to explain the facts and circumstances in which he could not deposit the amount in question in time.

Aside from the all above, in my considered opinion, the trial in a criminal case must not deviate in substance from the charge framed upon the cognizance of offence having been taken against the accused. It must be borne in mind that cognizance of the offence taken by the Magistrate which is the inception of the judicial trial is the primary conscientious perception by the Magistrate that offence has been committed. The charge framed in a criminal case is direct offshoot of such judicial perception. In the present case, the learned trial Magistrate framed charge against the accused by his order dated 27.01.1982 and read out the charge for offence under Section 409, I.P.C. as under :

> "कि आपने दि.15.6.81 को या इसके लगभग कूपचालक तृतीय जल योजना गांव किलचू के पद पर कार्यरत होते हुवे लोकसेवक के नाते जल योजना बमलू के उपभोक्ताओं से राजस्व राशि 2780/- रू० प्राप्त किये जो राशि आपने अपने में न्यस्त होते हुवे उस संपत्ति का बेईमानी से दुर्विनियोग कर लिया और इस प्रकार आपराधिक न्यास भंग कर ऐसा कार्य किया जो भा० द० सं० की धारा 409 के अधीन दंडनीय है और जो अपराध कि मेरे प्रसंज्ञान में है।"

The assertion by the Magistrate in the terms that, "जो अपराध कि मेरे प्रसंज्ञान में है" is about the offence charged of which judicial perception has been taken and, in the above charge, such offence is set out in terms that, "जो राशि आपने

अपने में न्यस्त होते हुवे उस संपत्ति का बेईमानी से दुर्विनियोग कर लिया और इस प्रकार आपराधिक न्यास भंग कर ऐसा कार्य किया जो भा० द० सं० की धारा 409 के अधीन दंडनीय है". Admittedly, alongwith his explanation Ex.-P/7, vide Ex.-P/6 the accused petitioner had deposited the amount with the government treasury and, the prosecution has not led any evidence of the department for having issued any notice or memo to the accused petitioner for procuring his attendance. Rather, it is on the record that the accused petitioner himself deposited the amount and furnished his explanation in the office of the Assistant Engineer for the delay caused in depositing the recovered revenue amount. In these facts and circumstances, in my considered opinion, neither the charge as framed is made out against the petitioner nor the charge so framed was proved at the trial against the petitioner.

In Narendra Pratap Narain Singh & Another Vs. State of U.P., AIR 1991 SC 1394, in similar circumstances, the Supreme Court exercised jurisdiction to interfere because the ingredient of 'dishonestly' in making out commission of the offence of criminal breach of trust was, in fact, not proved by the prosecution at the trial. To say the most, in the facts and circumstances of the case, any dereliction in the discharge of duty by itself is not sufficient to make out case of criminal breach of trust so as to be punishable under Section 409, I.P.C.

The office letter dated 07.10.1982, though placed on record at a much later stage while the appeal of the

petitioner was being heard by the learned Addl. Sessions Judge, Bikaner, finally concludes the question of criminality attachable to the petitioner's conduct. It may be noticed that at the time of examination before the trial Court on 07.04.1983, P.W.-2 Indrajeet, Asstt. Engineer of the Department plainly admitted in his cross-examination that Umanath (petitioner) is continuing on duty in the service. From this admission of the witness before the trial Court it is obvious that the department must have finally dealt with this matter at its level and, in fact, the aforesaid letter dated 07.10.1982 of the Executive Engineer, Project Division, P.H.E.D., Bikaner addressed to the concerned Assistant Engineer strikes at the root of the controversy to show that even the department itself was satisfied that the matter does not happen to be one of criminal breach of trust so as to incriminate the petitioner for committing offence punishable under Section 409, I.P.C. The said letter dated 07.10.1982 is reproduced hereunder :

"राजस्थान-सरकार

कार्यालय अधिशाषी अभियन्ता, परियोजना खण्ड, जन स्वा० अभि० विभाग, बीकानेर

क्रमांक:-अ० अ०/परि०/गबन/82-83/ दिनांक:-

सहायक अभियन्ता,
जन स्वास्थ्य अभियान्त्रिक विभाग,
परियोजना उपखण्ड तृतीय,बीकानेर।

विषय:-श्री उमानाथ मित्तल कार्य प्रभारित पम्प चालक तृतीय के संबन्ध में।

प्रसंग:-आपका पत्रांक 260 दिनांक 13.8.82

आपके उक्त पत्र के संदर्भ में लेख है कि श्री उमानाथ मित्तल कार्य प्रभारित पम्प चालक तृतीय द्वारा किये गये कथित गबन रु०2796/= के मामले पर विचार करने के पश्चात यह पाया गया कि यह मामला गबन का न होकर अस्थाई रूप से विभागीय राशि के दुरूपयोग का मामला है।

अत: कर्मचारी, जिसे अभी तक ड्यूटी पर नहीं लिया गया है, को तुरन्त प्रभाव से ड्यूटी पर लेने के आदेश दिये जाते हैं।

अधिशाषी अभियन्ता,
जन स्वास्थ्य अभियान्त्रिक विभाग,
परियोजना खण्ड, बीकानेर।

क्रमांक:-4890 दिनांक:-7/10/82

(1) प्रतिलिपि वरिष्ठ लेखाधिकारी, जन स्वा० अभि० विभाग, राजस्थान, जयपुर को उनके पत्रांक एच० जी० 10 ब{260}10472 दिनांक 8.9.81 के प्रसंग में सूचनार्थ प्रस्तुत कर निवेदन है कि जब तक उक्त मामला न्यायालय से वापिस नहीं उठा लिया जाता तबतक अनुशासनात्मक कार्यवाही औचित्यपूर्ण नहीं होगी। अत: निवेदन है कि मामले को न्यायालय से उठाये जाने की स्वीकृति प्रदान करें ताकि कर्मचारी के विरुद्ध उसके द्वारा विभागीय राशि के अस्थायी दुरूपयोग की अनुशासनात्मक कार्यवाही की जासके।

प्रतिलिपि सूचनार्थ :-

(1) अतिरिक्त मुख्य अभियन्ता, जन स्वा० अभि० विभाग, बीकानेर क्षेत्र, बीकानेर।

(2) अधीक्षण अभियन्ता, जन स्वा० अभि० विभाग, बीकानेर वृत, बीकानेर।

(3) श्री उमानाथ मित्तल कार्य प्रभारित पम्प चालक तृतीय द्वारा सहायक अभियन्ता, परियोजना उपखण्ड तृतीय, बीकानेर।

अधिशाषी अभियन्ता,
जन स्वास्थ्य अभियान्त्रिक विभाग,
परियोजना खण्ड, बीकानेर।"

The aforequoted letter is dated while the trial of the case was still pending. It is, therefore, manifestly clear that while the trial was still going on the Department concerned had already recorded finding that it was not a case of incriminating criminality against the petitioner for prosecuting him for an offence punishable under Section 409, I.P.C. As observed hereinabove, neither the charge as framed against the petitioner by the trial Court subsisted

for trial nor, in the facts and circumstances, the prosecution proved the charge so framed against the petitioner.

As a result of the foregoing discussion, in my considered opinion, both the Courts below have seriously erred on law in arriving at the finding of guilt against the petitioner. On the facts of the case, the finding is apparently perverse and deserves to be quashed and set aside.

Consequently, I accept this revision petition. The impugned judgments and order of conviction of the petitioner for offence under Section 409, I.P.C. is set aside. The sentence awarded to the petitioner also stands set aside. The petitioner is hereby acquitted of the charge levelled against him.

(Gopal Krishan Vyas) J.